Supreme Court, U.S.
FILED
AUG 7 1996
CLERK

(2)

No. 96-30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TONYA TINCH, et al.,

Petitioner,

vs.

CITY OF DAYTON, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. Anthony Sawyer
Director of Law, Dayton, Ohio

By: Neil F. Freund
Counsel of Record

Lisa A. Hesse
Co-Counsel

FREUND, FREEZE & ARNOLD
One Dayton Centre
1 S. Main St. Suite 1800
Dayton, OH 45402
(513) 222-2424
Special Counsel for
Respondents

35pp

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1: Whether United States Supreme Court precedent in Robertson v. Wegmann, 436 U.S. 584 (1978), and federal statutes including 42 U.S.C. § 1988, establish an accepted scheme for determining remedies for violations of 42 U.S.C. § 1983 that was, in this case, followed by the Sixth Circuit and here, resulted in a uniform application to that of other Circuits?

QUESTION 1A: Whether United States Supreme Court precedent mandated the Sixth Circuit to look to the law of the State of Ohio where federal law did not cover the survival of civil rights actions under § 1983 upon the death of the plaintiff?

QUESTION 1B: Whether the Sixth Circuit's determination that an action under 42 U.S.C. § 1983 is a personal action which does not survive death is mandated by existing United States Supreme Court precedent in Carey v. Piphus, 433 U.S. 247 (1978), the Sixth Circuit's own precedent in Jaco v. Bloechle, 739 F.2d 239 (6th Cir. 1984) and Jones v. Whittenberg University, 534 F.2d 1203 (6th Cir. 1976), and that precedent of the Ohio Supreme court in Perry-Eagle-Picher Indus., Inc., 52 Ohio St.3d 168(1990) and Allen v. Buradette, 139 Ohio St. 208(1942)?

QUESTION 1C: Whether, as supported by existing Sixth Circuit precedent in Jaco v. Bloechle, 739 F.2d 239 (6th Cir. 1984), a wrongful death statute

is irrelevant to the § 1988 analysis imposed on the court by Robertson v. Wegmann, 436 U.S. 584 (1978)?

QUESTION 1D: Whether Ohio Supreme Court precedent, followed by the Sixth Circuit, limited recovery of damages in a survival action to those actually suffered by the decedent before death, and disallowed duplicative awards for pain and suffering through an award for loss of enjoyment of life that a decedent could not cognitively appreciate?

QUESTION 1E: Whether Ohio law supporting recovery in a survival action of damages for a decedent's actual pain and suffering, but not recovery of damages for loss of enjoyment of life is consistent with the provisions and underlying policies of 42 U.S.C. § 1983 expressed in Memphis Comm. Schl. Dist. v. Stachura, 477 U.S. 299 (1986), to compensate a victim for losses he actually suffers and of which he is aware?

QUESTION 1F: Whether a failure to plead a cause of action under 42 U.S.C. § 1983 for violation of civil rights of family members bars later consideration of such cause of action at the appellate level?

QUESTION 2: Whether United States Supreme Court precedent in Los Angeles v. Heller, 475 U.S. 796 (1986) supports the Sixth Circuit's bifurcation of excessive use of force claims asserted against the police officers from the claims against municipal

defendants where a necessary prerequisite to the finding of liability against the municipal defendants is a determination that the individual officers violated Petitioners' civil rights, and whether such later trial against municipal defendants as to liability is necessary where the municipal defendants accept liability and agree to satisfy the judgment?

QUESTION 3: Whether a petitioner should be granted review through a writ of certiorari merely to reargue issues fully addressed in the lower courts and where Petitioners do not specifically cite any existing conflict between the Sixth Circuit's resolution of these issues and this Court, the Sixth Circuit, or other federal circuit courts?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vii
CONSTITUTIONAL PROVISIONS AND STATUTES	x
STATEMENT OF THE CASE	1
ARGUMENT	5
I. THE SIXTH CIRCUIT CORRECTLY DETERMINED IT NEED NOT DECIDE WHETHER A FAMILY MEMBER HAS STANDING TO SUE UNDER 42 U.S.C. § 1983 FOR THE WRONGFUL DEATH OF A RELATIVE WHERE PETITIONER FAILED TO PLEAD ANY SUCH CLAIMS ON HER OWN BEHALF OR ON BEHALF OF THE MINOR CHILDREN.....	5
II. THE SIXTH CIRCUIT'S ANALYSIS IN DETERMINING THAT AN ACTION UNDER 42 U.S.C. § 1983 IS A PERSONAL ACTION WHICH DOES NOT SURVIVE DEATH IS CONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT, NAMELY ROBERTSON V. WEGMANN, 436 U.S. 584 (1978) AND CAREY V. PIPHUS, 435 U.S. 247 (1978)	6

TABLE OF CONTENTS - Continued

Page

III. THE SIXTH CIRCUIT'S LIMITATION OF RECOVERABLE DAMAGES FOR A VIOLATION OF 42 U.S.C. § 1983 TO THOSE DAMAGES SUSTAINED BY THE DECEDENT BEFORE HIS DEATH IS CONSISTENT WITH ITS OWN PRECEDENT AND THAT OF THE OTHER CIRCUITS 8

IV. THE SIXTH CIRCUIT'S FINDING THAT OHIO LAW SUPPORTED RECOVERY IN A SURVIVAL ACTION OF DAMAGES FOR A DECEDENT'S PAIN AND SUFFERING BEFORE DEATH UPON A SHOWING OF CONSCIOUS PAIN AND SUFFERING, BUT NOT RECOVERY OF HEDONIC DAMAGES IS CONSISTENT WITH OHIO SUPREME COURT PRECEDENT 11

V. THE SIXTH CIRCUIT'S FINDING THAT OHIO LAW SUPPORTED RECOVERY IN A SURVIVAL ACTION OF DAMAGES FOR A DECEDENT'S PAIN AND SUFFERING BEFORE DEATH UPON A SHOWING OF CONSCIOUS PAIN AND SUFFERING, BUT NOT RECOVERY OF HEDONIC DAMAGES IS CONSISTENT WITH THE CONSTITUTION AND THE LAWS OF THE UNITED STATES WHERE SUCH AN AWARD TO A PERSON WHOSE INJURIES PRECLUDE ANY AWARENESS OF THAT LOSS SERVES NO COMPENSATORY PURPOSE 13

TABLE OF CONTENTS - Continued

Page

VI. THE SIXTH CIRCUIT'S AFFIRMANCE OF THE BIFURCATION OF THE CLAIMS AGAINST THE CITY OF DAYTON AND ITS POLICE CHIEF FROM THE CLAIMS AGAINST THE INDIVIDUAL POLICE OFFICERS DOES NOT CONFLICT WITH UNITED STATES SUPREME COURT PRECEDENT OR THAT OF OTHER FEDERAL CIRCUITS 14

VII. THE SIXTH CIRCUIT'S CONCLUSION THAT UPON DUE CONSIDERATION, PETITIONERS' REMAINING CHARGES OF ERROR DO NOT CREATE AN INDEPENDENT BASIS FOR THIS COURT'S REVIEW WHERE SUCH CONCLUSION DOES NOT CONFLICT WITH ANY INDENTIFIED PRECEDENT OF THIS COURT, THE SIXTH CIRCUIT, OR OTHER FEDERAL CIRCUITS 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases Cited

Allen v. Buradette,
139 Ohio St. 208 (1942)..... 11

Atlantic & Golf Stevedors, Inc.
v. Ellerman Lines, Ltd.,
369 U.S. 355 (1962) 19

Berry v. Muskogee,
900 F.2d 1489 (10th Cir. 1990)... 10

Carey v. Piphus,
435 U.S. 247 (1978)..... 6,7,13

Coates v. Johnson & Johnson,
756 F.2d 524 (7th Cir. 1985) 22

Daniels v. Williams,
474 U.S. 327 (1986)..... 6

Eaton Corp. v. Appliance Valve
Corp.,
790 F.2d 874 (D.C. Cir. 1986) ... 22

Fantozzi v. Sandusky Cement
Products Co.,
64 Ohio St.3d 601 (1992)..... 12

Flannery v. United States,
718 F.2d 108 (4th Cir. 1983)..... 14

Flory v. New York Central Rd. Co.,
170 Ohio St. 185 (1959)..... 11

TABLE OF AUTHORITIES - Continued

Page

Gallick v. Baltimore & Ohio Railroad American NTSA, 372 U.S. 108 (1963) 19

Garner v. Memphis Police Dept., 8 F.2d 358 (6th Cir. 1993) 17

Gordon v. Norman, 788 F.2d 1194 (6th Cir.1986)..... 8

Haynewsorth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987) .. 17

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) 17

Jaco v. Bloechle, 739 F.2d 239 (6th Cir. 1984)..... 6,8,9, 10,11

Jones v. Whittenberg University, 534 F.2d 1203 (6th Cir. 1976).... 8,9, 11,12

Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160 (1993) 16

Los Angeles v. Heller, 475 U.S. 796 (1986)..... 15

Memphis Comm. Schl. Dist. v. Stachura, 477 U.S. 299 (1986) 13

TABLE OF AUTHORITIES - Continued

Page

Monell v. New York City Dept. of Soc. Serv.,
436 U.S. 658 (1978) 15

Moor v. County of Alameda,
411 U.S. 693 (1973)..... 7

Perry-Eagle-Picher Indus., Inc.,
52 Ohio St.3d 168 (1990)..... 11

Pittsley v. Warish,
927 F.2d 3 (1st Cir. 1991)..... 6

Purnell v. City of Akron,
925 F.2d 941 (6th Cir. 1991)..... 5,6

Ramos v. Kuzas,
65 Ohio St.3d 42 (1992)..... 12,14

Rivas v. Freeman,
940 F.2d 1491 (11th Cir. 1991)... 17

Robertson v. Wegmann,
436 U.S. 584 (1978)..... 6,7,8, 9,13

St. Louis, I.M. & S. Ry. Co. v. Craft,
237 U.S. 648 (1915)..... 11

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969)..... 8

Toner v. Lederle Labs,
828 F.2d 510 (9th Cir. 1987)..... 19

TABLE OF AUTHORITIES - Continued

	Page
Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993).....	10
Statutes Cited	
Title 42 United States Code	
§ 1983.....	1,2,5, 6,7,8, 13,20,21
§ 1988.....	1,7,8,9
Ohio Revised Code	
§ 2125.01.....	9
§ 2305.21.....	9,11
Additional Authorities	
Federal Rule of Civil Procedure	
Rule 19.....	18
Rule 42(b).....	18

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED NOT PRODUCED IN PETITION FOR WRIT OF CERTIORARI

42 U.S.C. § 1988

Proceedings in vindication of civil rights; attorneys fees:

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and the Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF CASE

On June 19, 1989, Petitioner Tonya Tinch, as Administratrix of Scott Tinch's estate, filed suit against City of Dayton police officers Michael J. Sipes and Russell E. Neville, City of Dayton Commissioners Anthony Capizzi, Mark Henry, and Abner Orick, City of Dayton Mayor Richard Dixon, City of Dayton Police Chief James E. Newby, and the City of Dayton alleging violations of 42 U.S.C. § 1983, 1988 and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. App. O-267[1].

Tinch alleged that Officers Sipes and Neville violated decedent Scott Tinch's constitutional rights when he was shot during an altercation at an undercover informant's residence. Tinch also alleged that the Commissioners, the Mayor, the Police Chief and the City of Dayton were liable for an alleged failure to supervise or train Officers Sipes and Neville in their performance of police duties which caused the alleged constitutional deprivation. Tinch also asserted pendent state law claims for wrongful death and respondeat superior. See id.

On May 14, 1992, the district court granted summary judgment to Respondents

---

[1] All citations to the Appendix are referring to the Appendix in the Petitioners' Petition for Writ of Certiorari.

dismissing as defendants the City of Dayton Commissioners and Mayor, dismissing the claims for punitive damages against the City under 42 U.S.C. § 1983 and against all Respondents for punitive damages under Ohio's wrongful death statute, dismissing the Fifth, Sixth, Eighth, and Fourteenth Amendment claims. App. B-16.

A Motion for Separate Trials bifurcating from the trial of liability against the individual officers the issue of municipal liability was granted on March 16, 1993.

A bifurcated jury trial began on March 21, 1993. The jury returned a verdict for Petitioner upon special interrogatories and against Respondent Sipes for compensatory damages of $110,000 of which $25,000 was apportioned to conscious pain and suffering and $86,000 to loss of enjoyment of life of the decedent.

On April 21, 1993, an order noting the district court's intention to enter judgment in favor of Petitioner was filed. App. C-56. The district court overruled Petitioners' request for sanctions for alleged spoliation of use of force reports. Order and Judgment were entered in Petitioners' on May 12, 1993. App. D-62.

Thereafter, Petitioners' post trial motions were denied by the district court and final judgment entered. App. F-68, G-77.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit on April 15, 1994 followed by Respondents' Cross-Appeal on April 28, 1994. After briefing and oral argument, the Sixth Circuit rendered its Opinion on February 20, 1996. App. A-1. The Sixth Circuit in that Opinion affirmed the award of $25,000 for decedent's conscious pain and suffering accruing before death and reversed the award of $86,000 for decedent's post mortem loss of enjoyment of life. Id. at App. A-15. On April 4, 1996, Petitioners' Petition for Rehearing and/or Rehearing En Banc was denied by the Sixth Circuit. App. H-79.

The basic facts relevant to this case are summarized succinctly by the district court in its May 14, 1992 Decision and Entry (App. B-16 through B-18) as follows.

On June 17, 1987, Russell E. Neville ("Neville), a detective with the City of Dayton Police Department, received a call from a sometime informant, Vickie Grubbs ("Grubbs"). Grubbs requested that Neville meet her. Neville and another detective Michael J. Sipes ("Sipes") traveled to 2147 1/2 East Third Street, in Dayton, to meet with Grubbs, At that time, Neville and Sipes were dressed in street clothes and assigned to duty as undercover officers. When they arrived at 2147 1/2 East Third Street, Neville and Sipes went into the house and into the kitchen. They were informed Grubbs was in the bedroom and decided to wait for her in the kitchen.

Shortly thereafter, the decedent's brother, Shaun Tinch, entered the house and went into the bedroom where Grubbs was located. Neville and Sipes noticed a bulge under his shirt. The deceased, Scott Tinch, then entered the house following Shaun Tinch into the bedroom. Scott Tinch was carrying an axe handle.

After arguing with Grubbs, Scott Tinch exited the house. Shaun Tinch and Grubbs then entered the kitchen where they identified themselves as police officers showing their badges and their weapons, directing Shaun Tinch to put his hands against the wall, and the bulge in his shirt observed by the officers was identified to be a flashlight and removed.

Scott Tinch then reentered the house at which time the officers identified themselves as police officers. Scott Tinch, armed with the axe handle attacked Sipes with it. Sipes fired his gun, killing Scott Tinch.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY DETERMINED IT NEED NOT DECIDE WHETHER A FAMILY MEMBER HAS STANDING TO SUE UNDER 42 U.S.C. § 1983 FOR THE WRONGFUL DEATH OF A RELATIVE WHERE PETITIONER FAILED TO PLEAD ANY SUCH CLAIMS ON HER OWN BEHALF OR ON BEHALF OF THE MINOR CHILDREN.

As the Sixth Circuit recognized in its decision, a cause of action under 42 U.S.C. § 1983 was never asserted for the violation of the civil rights of Tonya, Amanda, or Justin Tinch. An examination of the Complaint demonstrates that the only allegations for violation of civil rights pursuant to § 1983 are with respect to the rights of the decedent, Scott Tinch. App. at O-282 through O-284, ¶¶ 51-57. At most, the Complaint alleges losses on behalf of the survivors, recoverable only under Ohio's wrongful death statute. App. at 0-283, ¶ 54.

The Sixth Circuit's finding was consistent with its own precedent established in Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991), wherein the plaintiffs similarly asserted only a cause of action under § 1983 on behalf of the decedent and were declined consideration of any constitutional deprivations on behalf of the spouse of children.

Further, even had the plaintiff not waived such claim, any refusal of such claim by the Sixth Circuit, as suggested

by the dicta of Purnell[2], is consistent with the approach of other circuits addressing this issue. See Pittsley v. Warish, 927 F.2d 3 (1st Cir. 1991)(state action must be directly aimed at the parent-child relationship to establish violation of a right to familial associational privacy). This approach is not only consistent with the express language of the federal statute, but also consistent with the general restriction that only deliberate government decisions depriving a person of life, liberty, or property are actionable under substantive due process as set forth by this Court in Daniels v. Williams, 474 U.S. 327, 331 (1986).

II. THE SIXTH CIRCUIT'S ANALYSIS IN DETERMINING THAT AN ACTION UNDER 42 U.S.C. § 1983 IS A PERSONAL ACTION WHICH DOES NOT SURVIVE DEATH IS CONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT, NAMELY ROBERTSON V. WEGMANN, 436 U.S. 584 (1978) AND CAREY V. PIPHUS, 435 U.S. 247 (1978).

The Sixth Circuit properly found that an action under 42 U.S.C. § 1983 is a

---

[2] Focusing on its previous holding in Jaco v. Bloechle, 759 F.2d 239 (6th Cir. 1984) that § 1983 provides a cause of action which is personal to the injured party, the Sixth Circuit implied that no claim would lie where an injury to a familial relationship was merely incidental to the offending conduct.

personal action accruing to the benefit of the person whose constitutional rights were violated and does not survive his death. App. at A-4. The Sixth Circuit recognized this Court's pronouncement that § 1983 is a "species" of tort committed against the individual whose constitutional rights have been denied. Id. citing Carey v. Piphus, 435 U.S. 247, 253 (1978). The Sixth Circuit further recognized and followed this Court's mandate in Robertson v. Wegmann, 436 U.S. 584, n.2 (1978) that determination of the applicable survivorship rule for actions arising pursuant to 42 U.S.C. § 1983, was governed by 42 U.S.C. § 1988. Specifically, this Court in Robertson stated:

> This statute recognizes that in certain areas "federal law is unsuited or insufficient' to furnish suitable remedies"; federal law simply does not "cover every issue that may arise in the context of a federal civil rights action." Moor v. County of Alameda, 411 U.S. 693, 702, 703 (1973),... When federal law is thus "deficient", § 1988 instructs us to turn to the "common law, as modified and changed by the constitution and statutes of the State," as long as these are "not inconsistent with the Constitution and laws of the United States."
>
> * * *
>
> One specific area not covered by federal law is that relating to

> "the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant."

Robertson, 436 U.S. at 587, 589. Contrary to Petitioners' assertion, the Sixth Circuit expressly followed these federal standards, as required by this Court in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) and as recognized in its own precedent, Gordon v. Norman, 788 F.2d 1194, 1199 (6th Cir. 1986), in its analysis in the present case. App. A-5. Such federal standards required resort to the forum state's common law, here Ohio, where federal law is deficient.

The Sixth Circuit's decision does not create a method for determining damages different from that mandated by the United States Supreme Court, as Petitioners seem to suggest.

III. THE SIXTH CIRCUIT'S LIMITATION OF RECOVERABLE DAMAGES FOR A VIOLATION OF 42 U.S.C. § 1983 TO THOSE DAMAGES SUSTAINED BY THE DECEDENT BEFORE HIS DEATH IS CONSISTENT WITH ITS OWN PRECEDENT AND THAT OF THE OTHER CIRCUITS.

Sixth Circuit precedent expressly recognizes the principles and procedures for the determination of allowable damages under § 1983 as set forth by 42 U.S.C. § 1988 and as interpreted and adopted by this Court and discussed in the previous section. See Jaco v. Bloechle, 739 F.2d 239 (6th Cir. 1984); Gordon v. Norman, 788 F.2d 1194 (6th Cir. 1986); see also Jones

v. Whittenberg University, 534 F.2d 1203 (6th Cir. 1976). The Sixth Circuit in its decision in this case acted consistent with its established precedent.

Specifically, in Jaco, an opinion written by Circuit Judge Krupansky who sat on the panel hearing this case in the Sixth Circuit, considered the extent of damages recoverable under Ohio's survivorship statute, Ohio Rev. Code § 2305.21, as the principle reference point in determining survival of civil rights actions. The Sixth Circuit found that Ohio's survivorship statute was predicated upon decedent's claim for damages sustained during his lifetime. Accordingly, a personal representative may bring on behalf of the decedent's estate, an action to recover such damages as the deceased might have recovered had he lived. It is the period of conscious pain and suffering experienced by the decedent during the interval between injury and ultimate death, not the death itself, which constituted the cause of action which survived the death of the decedent. Id. at 242; see also Jones v. Whittenberg, 534 F.2d 1203 (6th Cir. 1976).

Ohio's wrongful death statute, Ohio Rev. Code § 2125.01, on the other hand, created a claim for damages sustained by the decedent's estate as a result of his death, and not the personal injury actually suffered by the decedent. Id. at 242. Accordingly, the wrongful death statute was irrelevant to the § 1988 analysis imposed on it by Robertson v. Wegmann, supra. Id. at 243, n.5.

In Jaco, the Sixth Circuit did not find the scope of the decedent's cause of action unconstitutional or hostile, but instead merely objected to the absence of someone to bring such claims on the behalf of the decedent. It did not, as Petitioners suggest, set aside established Ohio law as to the type of damages recoverable in a survivorship action.

Neither does the Sixth Circuit's approach conflict with that of the Tenth Circuit in Berry v. Muskogee, 900 F.2d 1489 (10th Cir. 1990). In Berry, while arguing that a federal remedy should be fashioned, the Tenth Circuit suggested as that common remedy that of a survival action brought by the estate of the deceased victim in accord with 1983's express statement that the liability is "to the party injured", namely the decedent. Id. at 1506-1507. The Tenth Circuit expressly referenced Jaco. Id. The Sixth Circuit, in Jaco, limited damages to those damages the decedent personally and actually suffered before death, not that of his survivors which would be recoverable under a separate and pendent state wrongful death action. Implicitly, it seems the Tenth Circuit therefore agrees with the limitations of Jaco as to the scope of recoverable damages for § 1983 violations. Accordingly, even were the Sixth Circuit case of Weeks v. Chaboudy, 984 F.2d 185 (6th Cir. 1993) to require resort to Berry, no inconsistency arises.

To the extent that Berry might suggest that wrongful death actions and survival actions are equal, and thereby wrongful

death damages incorporated into this federal common remedy, this conflicts with this Court's precedent. See St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648, 658 (1915)(survival claim is for wrong to injured person, wrongful death claim is for wrong to beneficiaries). This distinction was recognized by the Sixth Circuit in its analyses in Jaco and Jones.

IV. THE SIXTH CIRCUIT'S FINDING THAT OHIO LAW SUPPORTED RECOVERY IN A SURVIVAL ACTION OF DAMAGES FOR A DECEDENT'S PAIN AND SUFFERING BEFORE DEATH UPON A SHOWING OF CONSCIOUS PAIN AND SUFFERING, BUT NOT RECOVERY OF HEDONIC DAMAGES IS CONSISTENT WITH OHIO SUPREME COURT PRECEDENT.

In keeping with the analysis required by this Court, the Sixth Circuit in this case went on to consider the law of the forum state, Ohio. Ohio's Supreme Court has found, that Ohio's survival of actions statute, Ohio Rev. Code § 2305.21, provides that a cause of action for personal injury survives the death of the injured party, and may be brought by the decedent's personal representative on behalf of the decedent's estate to recover such damages as the deceased might have recovered had he lived. Perry-Eagle-Picher Indus., Inc., 52 Ohio St.3d 168, 169-170(1990); Allen v. Buradette, 139 Ohio St. 208, 211 (1942). The Ohio Supreme Court sanctions recovery in a survival action of a decedent's pain and suffering resulting form a virtually instantaneous death, upon a showing of conscious pain and suffering before death. Flory v. New York Central Rd. Co., 170

Ohio St. 185, 189 (1959). The Sixth Circuit's statement of Ohio law in Jones v. Whittenberg, 534 F.2d 1203, 1207, 1213 (6th Cir. 1976), and as applied in this case was correct. Neither do Petitioners dispute this settled precedent.

Accordingly, the Sixth Circuit's affirmance of the jury award of compensatory damages of $25,000.00 for Scott Tinch's pain and suffering which accrued before his death was proper. The survival action ceased at the point of death, and no damages could be suffered by the decedent personally beyond the time of death.

The Sixth Circuit, however, found the jury's award of $86,000 for decedent's loss of enjoyment of life improper where Ohio law did not allow such recovery under circumstances where the deceased had no cognitive awareness. App. A-7.

While the Ohio Supreme Court has never addressed the right of a decedent to recovery of hedonic damages, or damages for loss of enjoyment of life, it has addressed this right in the context of personal injury actions. See Ramos v. Kuzas, 65 Ohio St.3d 42 (1992); Fantozzi v. Sandusky Cement Products Co., 64 Ohio St.3d 601 (1992). In Fantozzi, the Ohio Supreme Court refused to sanction a duplicative award wherein jurors included the "loss of enjoyment of life" within the element of pain and suffering or the permanency of the disability. Id. at 618. The Ohio Supreme Court, further in Ramos, vacated the portion of an award for compensatory damages including an award of

hedonic damages suffered by an infant, finding the award unwarranted because the infant had not developed the ability to have pleasurable activities, thus recognizing a requirement of cognitive awareness to justify such an award.

V. THE SIXTH CIRCUIT'S FINDING THAT OHIO LAW SUPPORTED RECOVERY IN A SURVIVAL ACTION OF DAMAGES FOR A DECEDENT'S PAIN AND SUFFERING BEFORE DEATH UPON A SHOWING OF CONSCIOUS PAIN AND SUFFERING, BUT NOT RECOVERY OF HEDONIC DAMAGES IS CONSISTENT WITH THE CONSTITUTION AND THE LAWS OF THE UNITED STATES WHERE SUCH AN AWARD TO A PERSON WHOSE INJURIES PRECLUDE ANY AWARENESS OF THAT LOSS SERVES NO COMPENSATORY PURPOSE.

Not only must the law of the forum state be consulted, but also the Sixth Circuit is required by Robertson v. Wegmann, 436 U.S. 584, 589-590 (1978), to assure consistency of the forum state's law with the provisions and underlying policies of the Constitution and laws of the United States. Petitioners ask this Court to ignore this important step.

Damages under § 1983 are to be awarded with the purpose of compensating one for injuries caused by the deprivation of a constitutional right. Memphis Comm. Schl. Dist. v. Stachura, 477 U.S. 299, 307 (1986). Deterrence, which is also an important purpose of § 1983 operates through the mechanism of compensation of the actual damages suffered by the victim. Id.; see also Carey v. Piphus, 435 U.S. 247, 256-257(1978).

Where a person is not consciously aware of the loss of enjoyment of life, an award for such injuries serves no compensatory purpose. An award of money damages has no meaning or utility to a deceased person. It "cannot provide such a victim with any consolation or ease any burden resting on him. He cannot spend it on necessities or pleasures. He cannot experience the pleasures of giving it away." Flannery v. United States, 718 F.2d 108, 111 (4th Cir. 1983) cert. denied 467 U.S. 1226. Some cognitive awareness is a prerequisite to recovery for the loss of enjoyment of life.

Scott Tinch, deceased, had no cognitive awareness, and therefore cannot be entitled to any recovery for loss of enjoyment of life, beyond any period of conscious survival. See also Ramos, supra. Further, as Scott Tinch has already been compensated for actual injury suffered through the compensatory damage award of $25,000, any additional award would be duplicative of the damages awarded for conscious pain and suffering.

VI. THE SIXTH CIRCUIT'S AFFIRMANCE OF THE BIFURCATION OF THE CLAIMS AGAINST THE CITY OF DAYTON AND ITS POLICE CHIEF FROM THE CLAIMS AGAINST THE INDIVIDUAL POLICE OFFICERS DOES NOT CONFLICT WITH UNITED STATES SUPREME COURT PRECEDENT OR THAT OF OTHER FEDERAL CIRCUITS.

The excessive use of force claims asserted against the police officers were bifurcated from the claims against Dayton based on the recognition that before Dayton could be liable on the basis of a

policy, custom, or failure to train, there must first be a constitutional deprivation at the hands of the individual police officers as established by this Court in Los Angeles v. Heller, 475 U.S. 796 (1986). A necessary prerequisite to the finding of liability against Dayton was a determination that the individual officers violated Petitioners' civil rights. A city or state's policies, standing alone, do not give rise to a § 1983 action. Id.

This Court specifically sanctioned bifurcation of the trial of the issues of liability of the officer and the municipality in Heller. In Heller, the jury returned a verdict in favor of the police officer. The district court found that since the police officer had been exonerated by the jury, there could be no basis for liability against the city. Id. at 798. Qualified immunity was not asserted as a defense on behalf of the police officer. The Ninth Circuit reversed the district court and found a verdict in favor of the officer did not foreclose an action under Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978) against the city. Id.

This Court then reversed the Ninth Circuit stating:

> Neither Monell v. New York City Dept. of Soc. Serv. [citation omitted], nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that

> the officer has inflicted no harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.

Id. at 799. It is therefore necessary, as the Sixth Circuit recognized when affirming bifurcation in this case, to determine whether a constitutional violation occurred at the hands of the police officers, before attempting to fix liability against Dayton.

The bifurcation does not, as Petitioners suggest, contradict Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160 (1993). The issue decided by this Court in Leatherman was limited to whether a federal court may apply a heightened pleading standard, more stringent than the usual requirements of Rule 8(a) of the Federal Rules of Civil Procedure, in civil rights cases alleging municipal liability. Additionally, in Leatherman, unlike this case, the individual officers were not included in the suit. This Court in its decision noted that an unsuccessful civil rights action had been separately filed by the plaintiffs against some of the individual officers involved which might have a collateral estoppel effect on the action before it. This Court chose, however, to limit its decision to the pleading issue and not address the collateral estoppel issue. Leatherman simply has no relevance to this case.

Neither did municipal liability automatically disappear with bifurcation, as Petitioners suggest. As the Sixth Circuit recognized,the district court found no need to continue with the determination of liability against Dayton, based on the verdict against Sipes, because Dayton acknowledged and would satisfy judgment awarded against Sipes. The Petitioner suffered only one constitutional deprivation which was valuated at trial, and there was little, if anything, to be accomplished in trying liability against Dayton.

Neither does the Sixth Circuit's affirmance of the bifurcation conflict with the its own law or the law in other federal circuits, namely that referenced by Garner v. Memphis Police Dept., 8 F.3d 358 (6th Cir. 1993); Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992); Rivas v. Freeman, 940 F.2d 1491 (11th Cir. 1991); and Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987). These cases which stand for the proposition that a municipality may still be liable even if the officer has no liability based on qualified immunity, have no application to this case. This case did not involve a determination that qualified immunity barred individual liability of the police officer; instead the jury determined the decedent suffered a constitutional deprivation at the hands of the individual officer, Sipes, which Dayton agreed to satisfy.

The City of Dayton was never dismissed as a party from this lawsuit, as Petitioners suggest. Trial of the

liability of the individual police officers was merely separated from trial of the municipal liability of Dayton. Dayton remained at all times a party to the lawsuit. Bifurcation does not affect an individual's standing as a party, nor does Fed. R. Civ. P. 19, therefore, have any application in this case.

The Sixth Circuit acknowledged the authority of a court to bifurcate a trial pursuant to Federal Rule of Civil Procedure 42(b), in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. App. A-10. The Sixth Circuit applied an abuse of discretion standard of review. Id. Petitioners do not dispute the correctness of such law; instead they argue merely a misapplication of a properly stated rule of law. Such does not rise to the level warranting a grant of review on a writ of certiorari. See Sup. R. 10.

VII. THE SIXTH CIRCUIT'S CONCLUSION THAT UPON DUE CONSIDERATION, PETITIONERS' REMAINING CHARGES OF ERROR DO NOT CREATE AN INDEPENDENT BASIS FOR THIS COURT'S REVIEW WHERE SUCH CONCLUSION DOES NOT CONFLICT WITH ANY IDENTIFIED PRECEDENT OF THIS COURT, THE SIXTH CIRCUIT, OR OTHER FEDERAL CIRCUITS.

Petitioners claim entitlement to review by this Court because the Sixth Circuit did not in its Decision give detailed reasons supporting its conclusion that the remaining charges of error on appeal, despite the Sixth Circuit's due consideration, were without merit. See

App. A-15. Petitioners cite no authority supporting such entitlement, nor any conflict with any decision of another United States Court of Appeals, the Sixth Circuit, or any relevant decisions of this Court.

As to the Petitioners' alleged inconsistency of rulings by the district court, there is an interpretation consistent with this Court's established precedent, as well as existing Ohio and Sixth Circuit law, and interpretative standards adopted by other federal circuits. This Court requires a court to harmonize the answers on a specific verdict, if possible, under a fair reading of the jury interrogatories. Gallick v. Baltimore & Ohio Railroad American NTSA, 372 U.S. 108 (1963). A court must search for a reasonable way to read the verdicts as expressing a coherent view of the case. Toner v. Lederle Labs, 828 F.2d 510 (9th Cir. 1987). If there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. Atlantic & Golf Stevedors, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962).

In this case, there was a view of the case which made the verdicts exonerating the officers on the wrongful death claims but finding Officer Sipes liable on the excessive use of force claim compatible. Throughout the trial of this case, Petitioners attempted to introduce issues related to custom and policy into the trial involving the individual officers. It was their position that the lack of policies and procedures involving

undercover officers led up to the shooting of Scott Tinch. Thus, over objection, Petitioners were was allowed to introduce into the trial of the two officers issues going beyond what occurred on the premises that evening. Issues related to what prompted the officers to get there and procedures as to how they were to go about meeting informants necessitated the jury to expand its view of the officers' actions.

As stated by the district court, the approach the Petitioners took required the jury to look beyond the act of Scott Tinch coming in with an axe handle and raising it up and the police shooting him. It required the jury to examine the broader context in which the shooting took place. Thus, the finding of recklessness related to the officers' presence at the house in the first place and the policies and undercover procedures, or lack thereof. The jury could have determined that it was not reasonably foreseeable for two brothers, drunk and out for vengeance, to suddenly arrive on the scene and attack the officers.

However, the excessive force claim under § 1983 narrowed the facts the jury was to consider to not what brought the officers to the scene, but to whether the officers acted reasonably when confronted with Scott Tinch coming at them with a raised axe handle. Proximate cause in the state claim was a slightly broader inquiry than proximate cause in the constitutional claim. The constitutional claim does not have a component of recklessness and the like. As a result, there was a view of

the case which made the two verdicts compatible. The jury was required to take a broader view of recklessness in the wrongful death claim, going beyond the mere acts at the house and included their approach to the premises and their knowledge and intent to meet an informant.

The determination of the § 1983 claim, excessive use of force, was narrowed to the actual actions which occurred inside the premises that night. The jury clearly could have determined that Officer Sipes did not act reasonably with respect to the attack by Scott Tinch on the premises that evening. The acts the jury found to be reckless involve the officers' acts of even going to the house in question that night. The jury could have easily found the officers to be reckless with respect to showing up at the residence at that time based on the information they had on the informant, but that those acts of recklessness did not proximately cause the death of Scott Tinch. The jury could have easily found it was not reasonably foreseeable for Scott Tinch to appear that night. Thus, there is a view of the case, as it was tried, which makes the jury interrogatories consistent. Since such approach, is consistent with that analysis required by this Court, review is not warranted.

Similarly, as to the issue of alleged evidence destruction, after hearing all evidence and conducting an investigation, the district court determined that the destruction of the reports, while negligent, did not rise to the level of bad faith necessary to sustain an adverse

inference against the Respondents, based on spoliation of evidence. A court may not allow an adverse inference to be taken against a party, based on spoliation of evidence, unless it appears the party did so in bad faith. Eaton Corp. v. Appliance Valves Corp., 790 F.2d 874, 878 (D.C. Cir. 1986); Coates v. Johnson & Johnson, 756 F.2d 524, 551 (7th Cir. 1985). Under such circumstances, reversal by the Sixth Circuit was unnecessary.

CONCLUSION

Discretionary judicial review should not be granted where the Sixth Circuit Court of Appeals has not entered a decision in conflict with the decision of another United States Court of Appeals. The Sixth Circuit's decision does not conflict with existing Ohio Supreme Court decisions; but instead follows existing precedent.

It cannot be said that the Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court that calls for this Court's exercise of its supervisory powers, where the Sixth Circuit has acted consistent with previous precedent established by it, this Court, and Ohio's Supreme Court.

Under such circumstances, and for the reasons more specifically stated herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. Anthony Sawyer
Director of Law, Dayton, Ohio

By: Neil F. Freund
Counsel of Record

Lisa A. Hesse
Co-Counsel

FREUND, FREEZE & ARNOLD
One Dayton Centre
1 S. Main St. Suite 1800
Dayton, OH 45402
(513) 222-2424
Special Counsel for
Respondents